LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 18 1969
JOHN F. DAVIS, CLERK

No. 1062

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH A. RISO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANNA R. LAVIN
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinion of the Court Below 2

Statement of Jurisdiction 2

Questions Presented For Review 2-3

Statutes Involved 3-4

Statement of the Case 5

Statement of Facts 6-7

Reasons for Granting the Writ 8-14

Conclusion 14

Appendix

Opinion of the Court Below ..... App. 1-8

Order Affirming ..... App. 9

Order Denying Petition for Rehearing ..... App. 10

LIST OF AUTHORITIES CITED

Cases

Davidson v. United States, 8 Cir., 51 F.2d 250 14

Gable v. United States, 7 Cir., 84 F.2d 929 12

Grimsley v. United States, 5 Cir., 50 F.2d 509 13

United States v. Di Re, 332 U.S. 581 10-11

Wiborg v. United States, 163 U.S. 632 14

Constitution and Statutes

Fourth Amendment to the Constitution 8

Title 18 U.S.C. § 2315 ..... 2, 3, 9, 11, 12

Title 18 U.S.C. § 3052 3

Title 28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO.

JOSEPH A. RISO,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable: The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Joseph A. Riso, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in the cause entitled *United States of America,* Plaintiff-Appellee, v. *Joseph A. Riso,* Defendant-Appellant, No. 16879 of that Court.

OPINION OF THE COURT BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 27, 1968, and is not yet reported; it appears in the printed appendix filed herein and in the record filed simultaneously herewith, and certified by the Clerk of the United States Court of Appeals for the Seventh Circuit.

The Petition for Rehearing was denied on January 20, 1969, and the Order denying said Petition is set forth in this Petitioner's Appendix hereto and in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on December 27, 1968. On the 20th day of January, 1969, it was ordered that the Petition for Rehearing be denied. This Petition is filed within thirty (30) days after the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTION PRESENTED FOR REVIEW

1. Does the bare receipt of a carton containing a painting of religious motif, fifteen months after theft, by the petitioner from a nun in front of a Church, supply probable cause for his arrest without warrant for a violation of section 2315 of Title 18, United States Code, and a search incident thereto?

2. Were FBI agents authorized under Title 18 U.S.C. §3052 to arrest petitioner without warrant?

3. Does the indictment charge an offense cognizable under federal law, and particularly under Title 18, U.S.C., §2315, in that it relies, for the painting's constituting interstate commerce on the fact allegation that "it *had been* transported from Renesselaer, Indiana, to Chicago, Illinois."[1]

4. When it plainly appears from the record that the petitioner was not charged with a crime cognizable under the laws of the United States, and none was proved against him, will not this court reverse his conviction as a guard against injustice?

STATUTES INVOLVED

18 U.S.C. §2315

Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps

"Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

"Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps,

---

[1] This point was not raised below, but as an attack on jurisdiction, we submit it is appropriate to raise at any stage.

moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

"Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used is falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

"This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country. As amended Oct. 4, 1961, Pub.L. 87-371, § 3, 75 Stat. 802."

Title 18 U.S.C. § 3052

Powers of Federal Bureau of Investigation

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. As amended Jan. 10, 1951, c. 1221, § 1, 64 Stat. 1239."

STATEMENT OF THE CASE

This action was commenced by the return of an indictment charging the Petitioner, Joseph A. Riso, in one count, with violating Section 2315, Title 18, United States Code, in that he did receive and conceal goods, wares, and merchandise of a value of $5,000.00 or more, to-wit: a painting entitled, "The Virgin and Child With St. Nicholas of Bari and a Donor" which painting was moving as, was a part of, and did constitute interstate commerce in that it had been transported from Rensselaer, Indiana, to Chicago, Illinois, then and there knowing such painting to have been stolen, unlawfully converted and taken. (A. 4)

A plea of not guilty was entered on June 30, 1967, and on July 7, 1967, a Motion to Suppress Evidence was filed (A. 10-11), which motion was denied on January 31, 1968, after hearing. (App. 21-90)

The cause proceeded to trial on February 1, 1968, before the Court sitting with a jury. (A. 91-212) A verdict of guilty was returned and judgment entered thereon on February 5, 1968, and on March 19, 1968, this Petitioner was ordered committed to the custody of the Attorney General for a period of eight years.

On appeal to the United States Court of Appeals for the Seventh Circuit, it was contended that the warrantless arrest of the petitioner and the search of him and his vehicle as an incident thereof was done without reasonable cause to believe that the petitioner had committed a crime; and, that the Government had failed to sustain its burden of proving the essential elements of the crime charged, particularly the value of $5,000.00 or more of the property and knowledge on the part of the petitioner of the stolen character of the property.

STATEMENT OF FACTS

On October 31, or November 1, 1965, a religious painting bearing the legend "The Virgin and Child with St. Nicholas of Bari and a Donor" was stolen from the library of St. Joseph's College in Rensselaer, Indiana. Fifteen months later, agents of the Federal Bureau of Investigation were conducting a surveillance of the Fine Arts Frame Company at Hubbard and State Streets, Chicago, Illinois. (A. 92)[2] This is a location one block north of the Chicago River and about three blocks north of the business heart of Chicago, the loop. The agents observed a nun[3] enter the store carrying a cardboard carton about 40" x 30". (A. 94)

While the nun remained in the store, Agent Baker left his car and walked to the front of the store where he looked in and saw the nun standing before a counter, behind which

---

[2] The Fine Arts Frame Company is among the, if not the, most prestigious, and expensive, business of its type in Chicago. It is located directly across the street (Hubbard) from Marina City, a modern Chicago landmark.

The Court will note the decision of the United States Court of Appeals for the Seventh Circuit indicates that in the Complaint for Arrest (filed after the arrest) that "the government had received information from a confidential informant that the defendant [petitioner] would transport the painting on January 25, 1967" (App. 1) Obviously, whatever information was received did not lead directly to the petitioner (Cf. *Draper* v. *United States*, 358 U.S. 307), nor is the prolonged surveillance of the framing shop and of the nun explained in any way. The informer's alleged information can be paid no heed in the circumstances.

[3] The opinion of the United States Court of Appeals refers to a woman in nun's garb and makes a point that "according to the Government's closing argument below, she may not have actually been a nun." (App. 2). There is nothing in the record to substantiate any question about the authenticity of her habit, and the agents who interviewed her constantly refer to her in their testimony as a nun.

was a man unidentified on this record. On the counter was a painting which he recognized having been the one taken from St. Joseph's. (A. 96) Baker's recognition of the painting was based on the fact that he had been assigned to the investigation concerning the stolen painting some fifteen months before, he had received detailed descriptions of the painting and had seen newspaper pictures of it. While there are some size and framing discrepancies, it is conceded for the purpose of this petition that he did, indeed, recognize the painting as the one stolen. An hour later the agents on surveillance saw the nun leave the store and enter a passing taxi. (A. 97-98) They followed the taxi to the vicinity of Addison and Paulina Streets, in Chicago, Illinois, a distance of about six miles from the framing store, on Chicago's northside. The cab followed a conventional route making directly for Michigan Avenue to the Outer Drive to Addison, down Addison (past Wrigley Field, where the Cubs and Bears play) about ten to twelve blocks to the Church. There the nun left the taxi and the driver carried the paper cardboard carton to the steps of St. Andrew's (this is a large Church, and formerly the seat of the Auxilliary Bishop of Chicago). The nun then paid off the driver and the driver left. (A. 206) Shortly thereafter the petitioner arrived in a vehicle, parked it a short distance from the entrance to the church, opened the trunk, and went up the stairs to meet the nun. The nun then descended the stairs and disappeared carrying the cardboard carton into an areaway leading to the rectory or convent, then reappeared carrying what was apparently the same cardboard carton and handed it to the petitioner, and he placed it in the trunk of his vehicle. (A. 47, 105, 208) At this time, the agents approached the petitioner and put him under arrest for a violation of Section 2315, Title 18, United States Code. (A. 47, 105)

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit for the following reasons:

I. The Court below decided an important Fourth Amendment question in this case in a manner completely in conflict with this Court's decision in *United States* v. *Di Re,* 332 U.S. 581. Here the case is more aggravated in that the associate is tacitly agreed to have had no criminal motive.

II. This Court should exercise its power of supervision to contain federal agents within their statutory authority to arrest without warrant only on account of offenses against the United States.

III. This Court should contain criminal sanctions to laws against the United States, and reverse for want of jurisdiction a conviction based on facts alleged in an indictment where federal jurisdiction is negated.[4]

IV. When the proof, as here, shows no violation of the laws of the United States, this Court should, in its supervisory power, as a guard against injustice, reverse the conviction.

---

[4] This point was not raised in the Courts below. We believe it is a basis for collateral attack. However, because of this conviction, petitioner's probation on a state charge was revoked, and, because of the revocation based on this conviction, his bond pending appeal from this conviction was revoked. He is presently incarcerated on this conviction.

I. AND II.

Fifteen months after a painting of religious theme was stolen from a school library in Rensselaer, Indiana, an F.B.I. agent recognized it from a distance of ten to fifteen feet away, through the window of a painting framing shop in Chicago, Illinois.[5]

The nun, after an hour in the framing shop, apparently discussing proper framing, emerged carrying a box suitable to hold a painting of the size that had been seen.

Entering a taxi, she proceeded directly to Saint Andrew's Catholic Church, on the northwest side of Chicago, Illinois. The taxi driver assisted her by carrying the carton up the steps of the Church. After she paid him his fare, he left. About this time petitioner appeared, parked his car near the entrance to the Church, and ascended the Church steps to meet her. They spoke, she descended with the package and entered the walkway leading to the Church Rectory or Convent. Reappearing moments later, she handed the carton to the petitioner and he put it in the trunk of his car.

Thereupon, he was placed under arrest for a violation of Title 18, United States Code, Section 2315, in that he did receive and "conceal" merchandise of a value of $5,000

---

[5] The agent had never before seen the painting, but had had it described to him in apparent detail and had seen newspaper pictures of it. Though we doubt if anyone, including an art expert, would be able to identify the painting under the circumstances, we assume for this petition that he did recognize it as he testified.

or more moving in or as a part of, or which constituted interstate commerce, knowing such property to have been unlawfully taken.

In sum, information on which the agents made the arrest was that petitioner received a carton in broad daylight, at about noon, on a city street in full view of all who wished to see.

While the F.B.I. agents surmised the carton contained the painting, they had not the slightest indication of any such knowledge, or even speculation, on the part of the petitioner. The nun did not testify, nor, for that matter, is she identified on this record. Though the agents spoke to her at the scene she was not detained. It would seem that, with the knowledge at the hands of the agents, even they could not justify the arrest of petitioner without the arrest of the nun, who is clearly shown to have knowledge of the contents of the package. It would appear the agents were satisfied of her innocence. How then can be justified the arrest of petitioner? Though in this Court's decision in *United States* v. *Di Re*, 332 U.S. 581, the associate was a criminal, and thus the facts more aggravated than here, this case is in direct conflict with that decision.

> "The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passersby, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration

coupons, it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact." *United States* v. *Di Re,* 332 U.S. 581, 593.

No theory of recent possession can supply the knowledge element (compare App. 6-7). Though fifteen months is a long time under any circumstances to employ the recent possession theory when property is found on a person, it may be rationalized under proper evidence that he concealed it because of its contraband nature. But here, the evidence shows the property did not come into the hands of the petitioner until *fifteen* months after its theft.

Further, the agents had no reason to believe the painting was moving, was a part of, or constituted, interstate commerce. There is no evidence nor reason to infer the painting had not been transported from Indiana to Illinois fifteen months before. The power of the agents to arrest without warrant is strictly circumscribed by Title 18 U.S.C., §3052 and confined to "any offense against the United States . . . or for any felony cognizable under the laws of the United States . . ."

All their knowledge lends inevitably to the conclusion that interstate commerce had come to rest. The activities of the nun, the hour long discussion over framing, the casualness, the openness—all tending to the conclusion that the painting had long since reached its destination.

III.

The indictment herein reads as follows:

"The JUNE, 1967 GRAND JURY charges:

"On or about January 25, 1967, at Chicago, in the Northern District of Illinois, Eastern Division,

JOSEPH A. RISO,

defendant herein, did receive and conceal goods, wares and merchandise of a value of Five Thousand Dollars ($5,000.00) or more, that is, a painting entitled, 'The Virgin and Child with Saint Nicholas of Bari and a Donar', which such painting was moving as, was a part of and did constitute interstate commerce in that it *had been transported from Rensselaer, Indiana to Chicago, Illinois,* then and there knowing such painting to have been stolen, unlawfully converted and taken; in violation of Title 18, United States Code, Section 2315." (Emphasis Ours.)

The factual allegations do not charge a crime under Title 18, U.S.C. §2315, in that movement in interstate commerce after a theft is not property "moving as, or which are a part of, or which constitute interstate . . . commerce, . . ."

This decision of the United States Court of Appeals for the Seventh Circuit is at complete variance with its own prior decision under the predecessor statute:

> "Under the act here relied upon, the receiver is not guilty unless the property which he receives has been stolen while moving in or constituting a part of interstate commerce. In the present case the property received by appellant was not stolen while moving in such commerce. Rather it was stolen in the state of Missouri, thereafter transported to Chicago, and then delivered to appellant." *Gable* v. *United States,* 7 Cir., 84 F.2d 929, 930.

It is true the predecessor statute had slightly different wording, however "stolen while moving in or constituting

a part of interstate commerce" must be held to have a meaning akin to receiving "goods . . ., moving as, or which are a part of, or which constitute interstate commerce."

In *Grimsley* v. *United States,* 5 Cir., 50 F.2d 509, the defendant was charged under a similiarly worded statute, to-wit: the National Motor Vehicle Act [then 18 U.S.C. §408].

The statute under which he was charged proscribed "one who receives, conceals, stores, barters, sells, or disposes of a motor vehicle, 'moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen.'" The Fifth Circuit held:

> "It is an essential element of the offense under the fourth section that the accused receive the motor vehicle while it is moving as, or is a part of, or constitutes, interstate or foreign commerce. The act, as is apparent on the face of it, is based upon the commerce clause of the Constitution, and does not assume to punish one who receives or sells a stolen motor vehicle after it has ceased to move in, or be a part of, interstate or foreign commerce. Brooks v. United States, 267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A. L. R. 1407. This essential element was not alleged in the indictments under consideration.
>
> "It is true that each appellant was charged with knowledge that the automobile which it was alleged he received and sold had been previously transported in interstate commerce; but for all that appears in either indictment, such transportation had come to an end and the automobile had come to rest in Florida long before the accused received or sold it. The indictments, under the most liberal interpretation, charged only the ordinary offense against the state law of receiving stolen goods with knowledge that they had been stolen; they failed to charge directly, or even by

implication, an offense within the jurisdiction of the federal District Court. An indictment is fatally defective which omits an essential element of the offense sought to be charged." *Grimsley* v. *United States,* 5 Cir., 50 F.2d 509-510.

To the same effect see *Davidson* v. *United States,* 8 Cir., 51 F.2d 250 at 255.

IV.

Where it clearly appears as it does here that a defendant has been convicted of an offense which the evidence fails to show was committed or that he committed it, the error of submitting the case to the jury for a determination is so plain and vital that this court is at liberty to and will reverse, solely in the public interest as a guard against injustice. *Wiborg* v. *United States,* 163 U.S. 632, 659.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that this Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the decision in this court.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Petitioner

APPENDIX A

SEPTEMBER TERM, 1968 SEPTEMBER SESSION, 1968

No. 16879

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOSEPH A. RISO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 27, 1968

Before SWYGERT, CUMMINGS, and KERNER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In a one-count indictment defendant Joseph A. Riso was charged with receiving and concealing a painting worth more than $5,000 and entitled "The Virgin and Child with St. Nicholas of Bari and a Donor," which had been transported from Indiana to Chicago. The indictment alleged that defendant knew that the painting had been stolen and that Section 2315 of the Criminal Code (18 U.S.C. § 2315) was accordingly violated.

Defendant's motion to suppress evidence was denied, the jury returned a verdict of guilty, and a sentence of 8 years was imposed.

The evidence showed that this painting had been stolen from the library of St. Joseph's College in Rensselaer, Indiana, on October 31 or November 1, 1965. According to the complaint filed with the United States Commissioner, the Government had received information from a confidential informant that the defendant would transport the painting on January 25, 1967. At 10:15 a.m. on

that date, FBI agent Baker, who had been assigned to investigate this theft, observed a woman in nun's garb[1] enter a frame shop on West Hubbard Street in Chicago with a flat 30" x 40" package. He looked through the front window of the shop, and at 10:55 a.m. he observed a single painting, which he recognized to be the stolen painting from a newspaper reproduction and other descriptions in his possession, on the counter. An unidentified male employee stood behind the counter examining the painting while the nun stood in front of the counter. There were no other paintings of similar size nearby. A multi-colored blanket and newspaper wadding were on the counter near the painting.

At 11:15 a.m., the nun left the shop and entered a taxicab with the same package. Baker and other agents in several vehicles followed the cab to St. Andrew's Church at Addison and Paulina Streets, Chicago. There the taxi driver, carrying the same package, escorted the nun up the steps of the church, where he was paid and dismissed, leaving the package with her.

Minutes later, defendant arrived in his 1966 Pontiac, parked it, opened the car trunk, and ascended the church steps to join the waiting nun. They then came down and the nun disappeared into an adjoining areaway with the package. In a few seconds, she reappeared with the same package and handed it to defendant. At this point, Baker's associate, FBI agent Bloom, called defendant by name and placed him under arrest. Defendant immediately dropped the package in his car trunk and slammed it shut. By using the defendant's car-key, taken from his hand

[1] According to the Government's closing argument below, she may not actually have been a nun.

without resistance, agent Baker opened the trunk and saw the same large, flat package that the nun had given defendant. Also in the trunk were numerous small packages addressed to defendant. After advising defendant of his rights, Baker asked him who owned the contents of the car trunk. Defendant replied that "Nothing in the trunk is mine," despite the fact that the small packages were addressed to him. Baker then asked the defendant whether he was the owner of the large flat package, and defendant answered, "I found it on the sidewalk." Upon opening the package, Baker discovered the painting described in the indictment. It was wrapped in the same blanket that he had observed on the counter of the frame shop.

On his way to the Chicago office of the FBI, defendant volunteered to agents Baker and Bloom that the nun was his cousin and had nothing to do with the matter, and that he was embarrassed to have been found in this situation in her presence because it would be embarrassing to his family. Defendant expressed his appreciation of the FBI's courteous treatment of the nun. The nun was not detained, although FBI agents Kellogg and Bell talked to her at the scene of defendant's arrest.

To prove that the painting was worth more than $5,000, the Government introduced the testimony of Burton Fredericksen, the curator of the J. Paul Getty Museum in Malibu, California.

Defendant did not adduce any evidence. His motion for acquittal was denied, as was his motion for a new trial or judgment notwithstanding the verdict.

Defendant first argues that his arrest was not based on probable cause, so that the related search of the car trunk

was invalid. Here the extensive surveillance activity surrounding the frame shop and the expected delivery or pick-up of the painting suggests that the FBI agents believed the painting still to be traveling through unclean hands. There would have been no occasion for stealth if the painting were thought to have passed into the hands of an innocent purchaser. While such advance information about contraband goods might not, in the absence of verification or corroboration of the source, be sufficient to support a valid arrest, where, as here, the observed facts bore out the expectations of the surveilling agents, there was probable cause for an arrest. *Draper* v. *United States,* 358 U.S. 307; *United States* v. *Burgess,* 402 F. 2d 85 (4th Cir. 1968) (per curiam). The chain of events described above more than suffices to warrant a prudent man in believing that the defendant was knowingly in receipt of stolen goods. Search of the defendant's automobile, which might have been used to remove the goods from the vicinity, was also warranted as incidental to the arrest. *Brinegar* v. *United States,* 338 U.S. 160; *Carroll* v. *United States,* 267 U.S. 132. Moreover, since the arresting agent saw the package before the trunk of the auto was slammed shut, he did not violate defendant's Fourth Amendment rights by opening the trunk to retrieve the package. *Harris* v. *United States,* 390 U.S. 234, 236 (per curiam).

Defendant's principal contention is that the Government failed to prove that the painting was worth more than the statutory minimum of $5,000. The $5,000 limitation was not designed to protect receivers of stolen goods but "to avoid overtaxing the Department of Justice." *United States* v. *Schaffer,* 266 F. 2d 435, 440 (2d Cir. 1959), affirmed, 362 U.S. 511. Under Section 2315 of the Criminal Code (18 U.S.C. § 2315), value can be determined by the

market value of the property at the time and place of the theft (*United States* v. *Tippett,* 353 F. 2d 335, 337 (4th Cir. 1965), certiorari denied, 383 U.S. 908), or by its value at any time during its receipt and concealment (cf. *United States* v. *Kramer,* 289 F. 2d 909, 921 (2d Cir. 1961)). Here the district court instructed the jury that value "ordinarily means market value, or the price a willing buyer would pay to a willing seller at the time the property was stolen," so that the jury's verdict of guilty means that it found that the painting was worth in excess of $5,000 in 1965.

The jury's verdict was amply supported by the only expert evidence. Thus museum curator Fredericksen testified that the painting was executed around 1530 by a member of the School of Giovanni Bellini in Venice, Italy, and that it was worth $17,000 at the time of the February 1968 trial. He also testified that the painting had been valued between $17,000 and $26,000 by the Parke-Bernet Gallery of New York City in 1953.[2] There was nothing in the record to show that the value of the painting had diminished below the requisite $5,000 at the time of the 1965 theft. In enacting Section 2315, Congress certainly did not require proof that the stolen property was worth more than $5,000 at the exact time and place of the theft, for accurate appraisals of value immediately prior to the theft would usually be impossible to obtain. The defendant had opportunity to introduce testimony of value but chose not to do so, nor was he able to undermine the reliability of the estimates of value given. The expert based his valuation "on what * * * it would cost to replace the picture if it had to be, how much a picture of

[2] The painting brought $2600 when sold at the Parke-Bernet Gallery in 1953, but there was only one bidder.

comparable quality would be insured for by a museum such as ours, or any other museum, what it would bring on the art market in New York or even in Europe." He testified that $17,000 was the "figure at which a transaction may be made between a willing buyer and a willing seller." The jury's finding that the value of the painting exceeded $5,000 was amply sustained by his testimony.

Finally, defendant asserts that there was insufficient evidence that he knew the painting had been stolen. On this point, the trial judge gave the following charge:

> "Possession of property recently stolen, if not satisfactorily explained is a circumstance from which you may reasonably draw the inference and find that the person in possession knew the property had been stolen.
>
> "The term 'recently' is a relative term which has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all the facts and circumstances shown by the evidence."

Defendant does not assail this instruction but claims that there was no evidence to support the knowledge requirement of Section 2315. This is a jury question, and the evidence must be viewed in the light most favorable to the Government. *United States* v. *Rabin,* 316 F. 2d 564 (7th Cir. 1963), certiorari denied, 375 U.S. 815. Circumstantial evidence is enough to sustain a finding of knowledge of the stolen character of the property. *United States* v. *Spatuzza,* 331 F. 2d 214 (7th Cir. 1964), certiorari denied, 379 U.S. 829. The courts uniformly hold that the possession of fruits of crime by an individual recently after the commission of the crime justifies an inference that the possession was with knowledge that the property was stolen. *Lee* v. *United States,* 363 F. 2d 469, 474, 475

(8th Cir. 1966), certiorari denied, 385 U.S. 947. As noted there, whether possession is sufficiently recent to support this element of guilt is a question of fact solely for the jury. Here it is true that the painting did not "surface" until 15 months after its theft, but still longer periods have been held sufficient to support the inference. *United States* v. *Allegrucci,* 299 F. 2d 811, 815, note 4 (3d Cir. 1962).

Even if the recent possession doctrine is not applied there was sufficient evidence to support the element of guilty knowledge on defendant's part. As in *Torres* v. *United States,* 270 F. 2d 252, 259 (9th Cir. 1959), certiorari denied, 362 U.S. 921, there was affirmative action on Riso's part which indicated guilty knowledge. First of all, as noted in the statement of facts, there were suspicious circumstances surrounding his receipt of the painting. The nun's transmission of this package to Riso was sufficiently extraordinary to discount this as a bona fide arms-length sale of a valuable piece of art. Cf. *United States* v. *Consentino,* 372 F. 2d 61 (7th Cir. 1967). As soon as he was detected with the package, the defendant dropped it inside his car trunk, slammed it shut in an effort at concealment and then refused to open it. Moreover, his statements to the FBI agents after his arrest implied guilty knowledge. Cf. *United States* v. *Scoleri,* 374 F. 2d 859 (7th Cir. 1967), certiorari denied, 387 U.S. 920. The district court quite properly instructed the jury that if it found that those exculpatory statements were untrue, it could consider them as circumstantial evidence of defendant's consciousness of guilt. The jury was surely entitled to disbelieve Riso's statement that he owned none of the small packages in the car trunk, even though they were addressed to him. The jury could also regard his statement of having found the box containing the

painting on the sidewalk to be patently false. Similarly, the statements, recounted herein, intended to absolve the nun of any involvement with the episode or knowledge of unlawful acts may have impressed the jury as admissions of his own complicity and guilty knowledge. Guilty knowledge was sufficiently proved.

The judgment is affirmed.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
Friday, December 27, 1968

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Otto Kerner, Circuit Judge

No. 16879

United States of America,
Plaintiff-Appellee,
v.
Joseph A. Riso,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
January 20, 1969

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Otto Kerner, Circuit Judge

No. 16879

United States of America,
Plaintiff-Appellee,

v.

Joseph A. Riso,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing filed in the above-entitled cause be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1062

JOSEPH A. RISO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1968. A petition for rehearing was denied on January 20, 1969. The petition for a writ of certiorari was filed on February 18, 1969. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether probable cause existed for the arrest of petitioner without a warrant and the incidental search of his vehicle.

2. Whether the indictment charged and the evidence showed that the stolen property was received while still in interstate commerce.

STATUTE INVOLVED

18 U.S.C. 2315 provides, in pertinent part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of receiving an oil painting worth more than $5,000, which was moving in interstate commerce, knowing the same to have been stolen, in

violation of 18 U.S.C. 2315. He was sentenced to imprisonment for eight years (A. 5, 20).[1]

On October 31 or November 1, 1965, an oil painting with a religious theme, valued at more than $5,000, was stolen from a Catholic college in Rensselaer, Indiana (A. 92, 159, 161, 174-175). On the morning of January 25, 1967, F.B.I. agents who were surveilling a picture frame shop in Chicago, just north of the Loop, saw a nun enter the shop carrying a flat package approximately 30 by 40 inches in dimension (A. 25-26, 28, 31-32, 92-95). The agent to whom the case was assigned and who was familiar with reproductions of the stolen painting passed in front of the shop. At a distance of from ten to fifteen feet, he saw the nun inside talking to a man. On a low counter between them next to a multi-colored blanket lay a painting which he recognized as the one which was missing (A. 33-37, 56, 64, 94-97). About an hour after the nun had entered the shop, she emerged, accompanied by a man in working clothes carrying a package which appeared to be the same as the one taken into the shop. The nun entered a taxicab and the package was placed on the back seat (A. 39-40, 98-99). The agents followed the cab to a Catholic church on the north side, where the nun got out and received the package from the driver. Shortly thereafter, petitioner drove up, parked his car next to the church and raised the trunk lid (A. 41-45, 81-82, 99, 100-102). The nun, after first taking the

---

[1] "A." refers to appellant's appendix in the court of appeals (pagination at bottom center of page).

package into an adjoining areaway, gave it to petitioner. As he prepared to place it in the trunk, one of the agents approached him and said, "FBI, Riso. You're under arrest. * * * You are being charged with interstate transportation of stolen property," at which point petitioner dropped the package into the trunk and slammed the lid shut (A. 48, 85, 105, 205-208). Petitioner was taken into custody and his rights explained to him. Petitioner said that nothing in the trunk belonged to him. The trunk was opened with a key taken from petitioner. Inside was the package which the nun had given him and a number of small packages addressed to him. The large package contained the missing painting, wrapped in the blanket which had earlier been observed in the frame shop (A. 97, 106-108, 110-112, 116, 122-123, 129). Petitioner said that he had found the large package on the sidewalk (A. 112). On the way to the F.B.I. office, petitioner volunteered that the nun was his cousin and that she had had nothing to do with this matter. He expressed his appreciation that she had not been detained and had been courteously treated (A. 113-114).

ARGUMENT

1. There was ample basis for petitioner's arrest without a warrant. The nun was known to be in possession of the stolen painting as the result of the agent's personal observation during her rather lengthy visit to the frame shop. The nature of the information which occasioned surveillance of both the shop and the church on the morning in question was not

revealed, apparently because of its confidential nature, but it is obvious from the steps taken that the agents expected the stolen painting to be transported on this particular day. Once the painting had been verified as the one missing from the Indiana college and it had been followed to the north side church, it was evident, when petitioner drove up and opened his car trunk even before meeting the nun, that he was expecting to receive the painting, as he did immediately thereafter. Circumstantial evidence may be sufficient to show knowledge that the goods in question are stolen. *Rugendorf* v. *United States*, 376 U.S. 528. The immediate arrest and recovery of the painting before petitioner could drive away was clearly proper. *Brinegar* v. *United States*, 338 U.S. 160; *Carroll* v. *United States*, 267 U.S. 132. Moreover, the agents had seen the package known to contain the missing painting before petitioner dropped it in the trunk and slammed the lid shut. Cf. *Harris* v. *United States*, 390 U.S. 234, 236; see Pet. App. 3-4.[2]

---

[2] Petitioner's subsequent actions, summarized in the Statement (*supra*, p. 4), were sufficient to show guilty knowledge without any reliance upon the traditional inference based upon possession of property recently stolen (see Pet. App. 6). His action in depositing the package in the trunk and slamming the lid closed when the agent called to him that he was under arrest, his falsely exculpatory statement that nothing in the trunk belonged to him, his statement that he had found the package on the sidewalk, as well as his volunteered statements to the agents on the way to the F.B.I. office, together with the other circumstances enumerated, provided more than a sufficient basis for the jury to infer that he knew that the painting was stolen (see Pet. App. 7-8).

2. The one-count indictment charged (A. 5):

> On or about January 25, 1967, at Chicago, in the Northern District of Illinois, Eastern Division, Joseph A. Riso, defendant herein, did receive and conceal goods, wares and merchandise of a value of Five Thousand Dollars ($5,000.00) or more, that is, a painting entitled, "The Virgin and Child with Saint Nicholas of Bari and a Donor", which such painting was moving as, was a part of and did constitute interstate commerce in that it had been transported from Rensselaer, Indiana to Chicago, Illinois, then and there knowing such painting to have been stolen, unlawfully converted and taken; in violation of Title 18, United States Code, Section 2315.

Petitioner, for the first time in this Court, contends that the indictment was fatally defective. He argues that the language, "in that it had been transported from Rensselaer, Indiana to Chicago, Illinois," negated federal jurisdiction since it showed that the painting was not moving in interstate commerce when received by him. Such language is not unusual in indictments under the statute. See *Lofland* v. *United States*, 357 F.2d 472, 474 (C.A. 9), certiorari denied, 385 U.S. 1026; *Corey* v. *United States*, 305 F.2d 232, 236 (C.A. 9), certiorari denied, 371 U.S. 956. The fact that transportation between States had occurred before the goods were unlawfully received does not establish that they were not still in interstate commerce. Nothing in the statute suggests that it was intended to be limited to cases where a future transportation to another State was contemplated. Certainly the indictment was sufficient to ad-

vise petitioner of the charge against him and to protect him against further prosecution on the same charge. *Hagner* v. *United States*, 285 U.S. 427, 431; *United States v. Debrow*, 346 U.S. 374, 376.

Petitioner extends this argument in discussing the existence of probable cause for his arrest and the sufficiency of the evidence, to urge that the fifteen-month interval between disappearance and reappearance of the painting indicated that it had come to rest in Illinois.[3] The question whether an interstate journey has come to an end is one of fact for the jury. *Pilgrim* v. *United States*, 266 F.2d 486, 488 (C.A. 5); *Schwachter* v. *United States*, 237 F.2d 640, 644 (C.A. 6); *Parsons* v. *United States*, 188 F.2d 878 (C.A. 5); *United States* v. *Gollin*, 166 F.2d 123 (C.A. 3), certiorari denied, 333 U.S. 875; *McNally* v. *Hill*, 69 F.2d 38, 40-41 (C.A. 3), affirmed, 293 U.S. 131; *United States* v. *Rocco*, 99 F. Supp. 746 (W.D. Pa.), opinion adopted, 193 F.2d 1008 (C.A. 3), certiorari denied, 343 U.S. 927. The facts of this case show that the painting was still in the process of disposition and thus had not come to rest when petitioner received it. The jury was justified in concluding that the painting was still in interstate commerce as part of a scheme ultimately to dispose of it some time after the notoriety of its theft had died down. See *Pearson* v. *United States*, 378 F. 2d 555 (C.A. 5).

---

[3] We do not find this question raised by petitioner's brief in the court of appeals; nor was the question discussed in that court's opinion (cf. Pet. App. 6-7, discussing whether the inference of guilty knowledge was appropriate in view of the fifteen-month interval).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

MARCH 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 326433 254